SUBJECT INDEX

Opinions Below 1

Questions Presented 2

Statutes Involved 2

Statement of the Case 3

Reasons for Denying the Petition 6

Argument—

Point One—There Is No Important Question of Federal Law 8

A. There is no paramount federal law authorizing the off-premises banking operations of Petitioner Bank 8

B. The off-premises banking operations of Petitioner Bank constitute branch banking under 12 U.S.C. §36 which specifically incorporates state branching law and makes it applicable to national banks 10

1. There is no conflict with decisions of other Circuits 11

2. There is no conflict with the *Walker Bank* case 14

C. The off-premises banking operations of Petitioner Bank violate Florida Statute Section 659.06 16

Point Two—The Decision of The Court of Appeals is Correct on Another Ground 18

A. Petitioner Bank is cashing checks and receiving deposits at its off-premises facilities 19

B. The off-premises banking operations of Petitioner Bank have traditionally been considered branch banking 21

Conclusion 22

Appendix—

A. Statutes A1

B. Documents used by Petitioner The First National Bank in Plant City in its off-premises operations A3

C. Rulings of the Comptroller of the Currency A4

Certificate of Service A7

Table of Citations

CASES

Bartels v. *Birmingham*, 332 U.S. 126 (1947) 21

Camden Trust Co. v. *Gidney*, 301 F.2d 521 (D.C. Cir. 1962), *cert. denied*, 369 U.S. 886 (1962) 12, 13

Federal Land Bank v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) 12

First National Bank v. *Missouri*, 263 U.S. 640 (1924) 9, 10, 16, 21

First National Bank v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) 6, 14, 15

Franklin National Bank v. *New York*, 347 U.S. 373 (1954) 8

Howell v. *Citizens First National Bank*, 385 F.2d 528 (3rd Cir. 1967) 18

Jackson v. *First National Bank*, 349 F.2d 71 (5th Cir. 1965) 12

Leuthold v. *Camp*, 273 F. Supp. 695 (D. Mont. 1967) .. 17

McClellan v. *Chipman*, 164 U.S. 347 (1896) 9

Merchants National Bank v. *State National Bank*, 77 U.S. 604 (1871) 9

Metropolitan National Bank v. *Camp*, 281 F. Supp. 238 (D.C. Mich. 1968) 12

Nuesse v. *Camp*, 385 F 2d 694 (D.C. Cir. 1967) 13

Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 12

South Dakota v. *National Bank*, 219 F. Supp. 842, 846 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964) 17

State Chartered Banks v. *Peoples National Bank*, 291 F. Supp. 180 (D.C. Wash. 1966) 20

Texas v. *National Bank of Commerce*, 290 F.2d 229 (5th Cir. 1961), *cert. denied*, 368 U.S. 832 (1961) 12

Union Savings Bank v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964) 17

Whitney Bank v. *Bank of New Orleans and Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965) 13

TEXTS

1 Fla. Jur. *Agency* §5 (1955) 21

Restatement (Second) of Agency §1 at 8 (1957) 21

STATUTES

Florida Statutes—

Section 659.06 ..... 5, 16, 18

Section 659.06(1) 17

Section 659.06(1)(a) 17

Section 659.06(2) 2, 3, 17

National Bank Act, 12 United States Code 21 *et seq.*—

Section 24 (seventh) 2, 6, 9

Section 36 ..... 2, 6, 7, 10, 14, 15, 22

Section 36(c) 14, 19

Section 36(f) 6, 7, 10, 11, 12, 13, 15, 16, 19, 20, 21

Section 36(h) 13, 14

Section 81 6

RULINGS

The Comptroller's Manual for National Banks, Paragraph 7490 4

Letter dated June 29, 1966, from Robert L. Schwind 4
Letter dated September 28, 1966, from office of the Comptroller of the State of Florida 3

MISCELLANEOUS

Congressional Record—
66 Cong. Rec. 1464 (1925) 10
66 Cong. Rec. 1627 (1925) 10, 21
66 Cong. Rec. 1777 (1925) 21
66 Cong. Rec. 4410 (1925) 21
67 Cong. Rec. 2840-41 (1926) 10
67 Cong. Rec. 3232 (1926) 21
67 Cong. Rec. 3241 (1926) 21
58 Op. Fla. Att'y Gen. 110 at 616 (1958) 18
The National Banking Review at 264 (1963) 4
29 Op. Att'y Gen. 81 (1911) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 777

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,
Petitioner,

vs.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION OF THE FIRST NATIONAL BANK IN PLANT CITY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT[1]

OPINIONS BELOW

The opinion of the District Court is reported at 274 F. Supp. 449. The opinion of the Court of Appeals for the Fifth Circuit is reported at 400 F. 2d 548.

1. References to the Appendix of this Brief are designated "A," and references to the Appendix of the Petition for Certiorari are designated "App." References to the Petition for Certiorari filed by The First National Bank of Plant City are identified as "Pet."

QUESTIONS PRESENTED

1. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida constitute branch banking in violation of the National Bank Act[2] and state branching law incorporated therein?

2. Whether the off-premises bank armored car and depository operations performed by a national banking association doing business in the State of Florida violate federal and Florida banking law?

STATUTES INVOLVED

In addition to the statutes cited by Petitioner, Florida Statute Section 659.06(2)[3] is involved:

> "(2) . . . The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); . . . ."

Title 12 United States Code Section 24 (seventh)[4] is also involved:

> "§24. **Corporate powers of associations**
>
> * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . . ."

---

2. *McFadden Act*, §§7 and 8, 44 Stat. 1228-29 (1927), as amended, *Glass-Steagell Act*, §23, 48 Stat. 189 (1933), as amended, 12 U.S.C. §36 (1964).

3. Laws of Florida, Ch. 28016 (1953), as amended, Laws of Florida, Ch. 276 (1965) (A. 1-2).

4. Rev. Stat. §5136 (1875).

STATEMENT OF THE CASE

In September, 1966, Petitioner, The First National Bank in Plant City, ("Petitioner Bank") began providing, without charge, bank armored car operations for its customers in Plant City, Florida, and the surrounding trade area. The armored car, which is owned, staffed, and completely controlled by Petitioner Bank, operates daily, six days a week. (R. 63-65, 485-87; see R. 1404-08 for pictures). Change is delivered to the customers' premises, and monies and checks for deposit are taken back to the bank. Petitioner Bank bears the entire cost of the armored car operation as well as sole responsibility for the monies during transit. (R. 487; State Banks Ex. 1, R. 517, 566).

About the same time, Petitioner Bank began operating an off-premises bank depository for its customers, also without charge. This facility is in a shopping center mall about one mile south of Petitioner Bank's main banking house. A receptacle for receipt of customers' monies and night bags is maintained there, together with a writing table equipped with bank forms and supplies, and a bench. (See R. 1398-1403 for pictures.) The facility is serviced daily by the bank's armored car.

Florida Statute Section 659.06(1)[5] requires all of the business of a bank to be transacted at its banking house or authorized drive-in and walk-up facilities. The operation of a drive-in or walk-up facility located anywhere other than the banking house property and contiguous property is prohibited. FLA. STAT. §659.06(2). By letter dated September 28, 1966, the Office of the Comptroller of the State of Florida ("State Comptroller") advised Petitioner Bank that its off-premises banking activities violate Florida law (R. 2096).

---

5. Laws of Florida, Ch. 6426, §1 (1913).

Although admitting that it is carrying on the "business of banking" at its off-premises facilities (R. 22-23), Petitioner Bank contended it was not required to comply with Florida law because it was acting pursuant to rulings of the United States Comptroller of the Currency. Petitioner Bank asserted that it was operating the shopping center depository pursuant to a letter dated June 29, 1966, from the regional counsel for the office of the Comptroller of the Currency (R. 2093).[6] Petitioner Bank further asserted that it was authorized to operate the armored car by Paragraph 7490 of *The Comptroller's Manual for National Banks*, which provides as follows:

> "To meet the requirements of its customers, a National Bank may provide messenger service by means of an armored car or otherwise, pursuant to an agreement wherein it is specified that the messenger is the agent of the customer rather than of the bank. Deposits collected under this arrangement are not considered as having been received by the bank until they are actually delivered to the teller at the bank's premises. Similarly, a check is considered as having been paid at the bank when the money is handed to the messenger as agent for the customer." (R. 2092).

This ruling was announced by Comptroller of the Currency, James J. Saxon, in December, 1963, in *The National Banking Review* at 264.

Petitioner Bank accordingly purports to perform its off-premises banking operations pursuant to a "Comprehensive Dual Control Contract" or a "Messenger Transmittal" slip which states that Petitioner Bank is transporting the funds as "agent" for the customer (R. 2094-95: A.

---

6. On deposition, regional counsel stated that his letter was not a ruling and that he was simply reiterating prior rulings made in the Washington office (R. 1017, 1019-20). However, the Washington "precedent file" which was made available to Respondents by court order neither contained nor reflected any such ruling (R. 1436-519).

3-4). The "Messenger Transmittal" slip further provides that the monies "shall not be deemed to be a deposit" until delivered to the banking house.

In October, 1967, Petitioner Bank filed an action against the State Comptroller, asserting that its off-premises banking operations are authorized under paramount federal law, and, further, that such activities do not violate Florida Statute §659.06 (R. 10-18). The Hillsboro Bank, Peoples Bank of Lakeland, and First Ruskin Bank ("Respondent Banks"), three state banks serving the same trade area as Petitioner Bank, were permitted to intervene as parties defendant. Thereafter, William B. Camp, Comptroller of the Currency of the United States, ("National Comptroller") intervened as a party plaintiff.

On May 6, 1967, the District Court granted Petitioner Bank and the National Comptroller a partial summary judgment[7] (R. 2047-60).[8] The District Court held that the documents used in the off-premises transactions conclusively establish that Petitioner Bank acts as agent for its customers and that Petitioner Bank is not receiving deposits off-premises. Although Petitioner Bank was found to be cashing checks through its off-premises operations, the District Court nevertheless determined that the operations were performed in substantial compliance with the National Comptroller's rulings. There was therefore held to

7. Preliminary to entry of summary judgment, the District Court held that, to prevail, Petitioner Bank had *only* to establish that its operations "substantially comply" with the National Comptroller's ruling (R. 991). The District Court then also severely restricted Respondents' efforts to pursue discovery, holding, *inter alia*, that they were entitled only to the names of *five* customers of Petitioner Bank, to be selected by Petitioner (R. 986-91). The nature of Petitioner Bank's operations, upon which final judgment was entered, was based on testimony of bank employees and their customers. Although the customers' testimony conflicted with the employees', the District Court held Petitioner Bank had met its burden of substantial compliance with the rulings. All of these rulings were attacked by Respondents on appeal.

8. 274 F. Supp. 449; App. 21a-32a.

be no violation of 12 U.S.C. §§36 and 81 as a matter of law. Holding that the off-premises banking operations did not violate Florida law, the District Court refused to rule upon the question of whether the off-premises banking operations are authorized as implied powers of national banks under 12 U.S.C. §24 (seventh). Final judgment was accordingly entered against Respondents on June 2, 1967 (R. 2061).

The Fifth Circuit Court of Appeals reversed,[9] holding that Petitioner Bank's off-premises armored car and shopping center depository operations constitute branch banking under 12 U.S.C. §36(f). The Court of Appeals then examined Florida Statute §659.06 and, concluding that such branching activities violated Florida law, held that such operations were prohibited to national banks under federal law.

REASONS FOR DENYING THE PETITION

Pursuant to a "policy of equalization," Congress incorporated state law on branch banking in 12 U.S.C. §36 and made it equally binding on national banks doing business within a state. The holding of the Court of Appeals that state law controls the establishment of branches by national banks is in accord with that statute and the pertinent decision of the United States Supreme Court in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). The *Walker Bank* principles were applied by the Fifth Circuit only to *branching operations* which were explicitly found to be present and not to any other phases of national bank operations.

Basic to the determination of the Fifth Circuit that the armored car and shopping center depository operations of Petitioner Bank constitute branch banking as

9. 400 F.2d 548; App. 1a-20a.

defined in 12 U.S.C. §36(f) was its holding that branching is a practical matter of function rather than bookkeeping and paper work, as contended by Petitioner Bank herein. This construction of the federal branching statute is consistent with both the precise terms thereof and the well-established Congressional policy of competitive equality in branch banking. Further, the Court's holding is consistent in principle with decisions of other courts of appeals.

Contrary to Petitioner Bank's assertion, the decision of the Court of Appeals in no way authorizes a state to prohibit any off-premises banking activity of a national bank as branching "even though the National Bank Act defines 'branch' in different and conflicting terms." (Pet. at 7). The Fifth Circuit expressly held that an off-premises activity must be a branch as defined in 12 U.S.C. §36(f) *before* state branching law comes into play. (App. 13a-16a).

The decision in question is correct on another ground. As the Court of Appeals recognized, the so-called "agency" and "deposit" documents used by Petitioner Bank in its off-premises banking operations are nothing more than devices to avoid the impact of the federal branching statute. The "agreements" have no practical effect on the customary relationship between the bank and its customers and Petitioner Bank is in fact receiving deposits and cashing checks off-premises. These operations constitute branch banking under the terms of 12 U.S.C. §36(f). If the provisions of 12 U.S.C. §36 could be negated by the simple subterfuge of "deposit" and "agency" agreements, obviously national banks would be free to branch bank irrespective of state law. Therefore, if any vestige of competitive equality is to prevail in the branching area, the decision of the Fifth Circuit Court of Appeals to consider

branch banking as a matter of substance rather than form is correct.

Additionally, there is another ground upon which the decision can be sustained. The off-premises armored car and depository operations of Petitioner Bank are not authorized under the National Bank Act as express or implied powers. Since there is no paramount federal law, Florida law prohibiting such operations is applicable to and must be honored by Petitioner Bank.

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

(A) There is no paramount federal law authorizing the off-premises banking operations of Petitioner Bank.

Petitioner Bank states that there is an important question of federal law involved because state law was improperly applied to national banks. Relying on *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), Petitioner Bank incorrectly asserts that state law does not apply to national banks except in those instances where Congress has expressly made a particular phase of national banking subject to state law. It is true that, electing to follow a policy of equalization between national and state banking associations, Congress has expressly adopted state law as the standard for national banks in some competitive areas. Petitioner Bank miscites *Franklin*, however, which also recognizes that, "even in the absence of such express language," national banks may be subject to state law if there is no conflict with federal law. 347 U.S. at 378. Hence, the decision of the Court of Appeals herein to apply state law to national banks is consistent with the *Franklin* case as well as other hold-

ings of the Supreme Court that state law generally operates upon the activities of national banks except when it conflicts with federal law. *McClellan* v. *Chipman*, 164 U.S. 347 (1896); *First National Bank* v. *Missouri*, 263 U.S. 640 (1924).

Petitioner Bank further states, however, that its off-premises banking operations are authorized under 12 U.S.C. §24 (seventh) as an implied power of national banks so that state law is preempted, and that the District Court so held. Although Respondents attempted to raise this issue below, the District Court refused to rule upon it, stating it was not "appropriate or necessary" to consider whether Petitioner Bank's off-premises activities were authorized under 12 U.S.C. §24 (seventh) (R. 2061; App. 32a). Nevertheless, the point now re-occurs as if decided by the courts below. (Pet. at 9).

Respondents assert that the off-premises armored car and depository facilities of Petitioner Bank are *not* authorized as implied powers under the National Bank Act. In *First National Bank* v. *Missouri, supra*, the Supreme Court expressly held that *"the mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business,* within the meaning of [12 U.S.C. §24 (seventh).]" 263 U.S. at 659. (Emphasis supplied). Yet "multiplication of places" where a bank may exercise its powers of receiving deposits and cashing checks is precisely what is asserted herein to be implied as an incidental power of national banks.

Merchants' National Bank v. *State National Bank*, 77 U.S. 604 (1871), cited by Petitioner Bank at pages 8-9 of its Petition as authorizing off-premises agency activities "such as those involved here" merely held that, since

national banks clearly had the power to purchase gold, they could pay for it off-premises. Thus, Petitioner Bank's only authority for its statement is a 1911 opinion[10] of the United States Attorney General holding that a national bank could appoint agents "to receive and collect money and forward it to the bank." However, legislative debates over the federal branching statute establish that one of the primary objectives of Congress was *to overrule that opinion* by expressly prohibiting such agency activities of national banks unless permitted to state banks under state law. 66 Cong. Rec. 1464, 1627 (1925); 67 Cong. Rec. 2840-41, 3232 (1926). Consequently, an "agency" where "deposits are received, checks paid, or money lent" is specifically defined in 12 U.S.C. §36(f) as a branch. Since national banks are expressly prohibited from performing these functions through off-premises agencies unless authorized by state statute, it is difficult to see how such operations could be an implied power of national banks in derogation of state law. As the Supreme Court recognized in the *Missouri* case, "an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted." 263 U.S. at 659.

(B) The off-premises banking operations of Petitioner Bank constitute branch banking under 12 U.S.C. §36 which specifically incorporates state branching law and makes it applicable to national banks.

Title 12 U.S.C. §36 provides that a national banking association may establish and operate a branch only if this is expressly authorized to state banks by the law of the state in question. Nevertheless, Petitioner Bank states

10. 29 *Op. Att'y Gen.* 81, 90 (1911).

that the Fifth Circuit wrongly held that Florida branching law controls the legality of the off-premises banking operations of Petitioner Bank in the instant case. (Pet. at 7).

It is asserted that the decision potentially permits any off-premises activity of a national bank to be prohibited under state law as a branch "even though the National Bank Act defines 'branch' in different and conflicting terms." (Pet. at 7). However, in its attempt to demonstrate that certiorari should be granted, Petitioner Bank distorts the actual holding of the Court of Appeals by quoting isolated phrases out of context.

The Court of Appeals expressly held that federal law initially controls the question of what is a branch, and application of state law was limited to operations initially found to be branch banking under the National Bank Act. The Court stated that 12 U.S.C. §36(f) determines " '*prima facie* if the supplementing state branching law should come into play.' " (App. 13a). It was stressed that state law comes into play *only after* a determination has been made that the facility constitutes a branch under section 36(f). (App. 13a-14a). As the Court expressed it, if the facility possesses the characteristics of a branch as defined in section 36(f), "we have passed over the threshold of federal law and must then turn to state law for a full consideration of this facility's character.' " (App. 15a).

1. There is no conflict with decisions of other Circuits.

Respondents submit that the decision of the Court of Appeals that section 36(f) establishes the functional test of a branch accords completely with provisions of the fed-

eral branching statute and with the decisions of other courts on this point.[11]

In section 36(f),[12] Congress specifically used the term "include" in defining a branch. The word "include" is generally held to connote an illustrative and partial definition. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). The Fifth Circuit Court recognized this in holding that section 36(f) is a "partial, functional definition" of a branch. On the other hand, this particular point was not raised or ruled upon in the cases cited by Petitioner Bank as conflicting with the decision of the Fifth Circuit Court.[13]

Camden Trust Co. v. *Gidney*, 301 F.2d 521 (D.C. Cir. 1962), *cert. denied*, 369 U.S. 886 (1962), involved totally different facts and issues than the instant case. In *Camden*, the question presented was whether a national bank which had established a new bank as "a completely separate entity" was thereby branch banking. The Court of Ap-

11. The Fifth Circuit's decision in no way conflicts with its earlier decisions. In *Texas* v. *National Bank of Commerce*, 290 F.2d 229 (1961), *cert. denied*, 368 U.S. 832 (1961), the Fifth Circuit held that, since the Secretary of Treasury was authorized by federal statute to permit national banks to open and maintain banking facilities on federal military installations in Texas, the state could not limit such facilities under the provision against branch banking. The Court of Appeals recognized state branching law and policy, holding only that "in these circumstances" it had to "give way slightly. . . ." *Id.* at 234. In *Jackson* v. *First National Bank*, 349 F.2d 71 (1965), the Fifth Circuit Court applied state law to off-premises banking operations of a national bank after determining that such operations constituted a branch under section 36(f). The Fifth Circuit followed exactly the same course of action in the instant case, relying in part on the *Jackson* case in so doing.

12. "The term 'branch' as used in this section *shall be held to include*. . . ." (Emphasis supplied).

13. For instance, in *Metropolitan National Bank* v. *Camp*, 281 F. Supp. 238 (D.C. Mich. 1968), the District Court simply found that the activities did not meet the statutory definition of a branch in section 36(f).

peals for the District of Columbia held that the new bank was not a "branch" as defined in section 36(f), and that, although the new bank might be an "affiliate," Congress recognizes a distinction between a "branch" and an "affiliate." The decision herein does not conflict with the statement in *Camden* that Congress defined a "branch" in section 36(f). The Fifth Circuit similarly held that this section provides a definition of branching but then went on to hold that the definition was partial and functional rather than exclusive.

In *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *rev'd on other grounds*, 379 U.S. 411 (1965), the proposed new bank was clearly not an "affiliate" and a branching operation was found to exist. Noting that Congress gave a broad meaning to the word "branch" in section 36(f), the Court of Appeals for the District of Columbia held that "the nature of the arrangement, and not the label applied to it" determines whether there is a branching operation. *Id.* at 301. The Fifth Circuit's refusal to construe section 36(f) "as permitting paper evasions from state anti-branching laws" is certainly consistent with that decision. (App. 17a).

The Court of Appeals for the District of Columbia was subsequently presented with almost exactly the same issue as that involved herein. In *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967), the question was what, for purposes of the National Bank Act, is a "state bank" as defined in 12 U.S.C. §36(h).[14] The District Court held that "only the construction of a federal statute is at issue" but the Court of Appeals for the District of Columbia *reversed*, holding that, even

14. Title 12 U.S.C. §36(h) defines "State banks" as *including* "trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws".

though §36(h) did not expressly adopt state law, it is part of a federal statute reflecting a policy of coordination of state and federal law. The Court concluded that *"it would be unsound to assert that the proper interpretation of §36(h) is independent of state policy and legislation."* *Id.* at 705. (Emphasis supplied). Respondents submit that the decision of the Fifth Circuit Court of Appeals herein is completely consistent with the decision of the Court of Appeals for the District of Columbia in *Nuesse*, as well as the prior decisions of that Circuit.

2. There is no conflict with the Walker Bank case.

Petitioner Bank's assertion that state branching law is inapplicable to its off-premises banking operations is essentially the same as the proposition urged by the National Comptroller in *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It is contended herein that, since state law was not expressly incorporated under section 36(f), state law defining branching does not bind national banks. Similarly, in *Walker Bank*, the National Comptroller argued that section 36(c)(2) [dealing with branching beyond city limits] expressly incorporated state branching restrictions whereas section 36(c)(1) [dealing with branching inside city limits] did not. This allegedly showed a congressional intent that state branching restrictions did not bind national banks under section 36(c)(1).

The Supreme Court held, however, that national banks are subject to the restrictions of state branching law, observing that it "is a strange argument that permits one to pick and choose what portion of the law binds him." 385 U.S. at 261. It was held that the restriction, regardless of how it was designated, was an integral part of state branching policy which was absorbed under section 36(c). There-

fore, the National Comptroller's argument was rejected in *Walker Bank* for reasons equally applicable herein.

In the instant case, the off-premises banking operations of Petitioner Bank were determined to be branch banking as defined in 12 U.S.C. §36(f). Only then did the Court of Appeals look to the laws of Florida to determine whether or not such activities were permitted to state banks under state law. Clearly this is the direction of 12 U.S.C. §36 and the decision of the Supreme Court in *Walker Bank*.

Petitioner Bank states, however, that the decision of the Court of Appeals is an improper extension of the *Walker Bank* decision. This assertion is premised upon its unwarranted assumption that the Fifth Circuit applied state law to all off-premises activities of national banks. (Pet. at 11). Based upon this assumption, Petitioner Bank attempts to show conflict with *Walker Bank* by portending various applications of such a holding.

Respondents submit that the mere listing of remote analogies which might be subsequently made does not establish any present or direct conflict of decisions. Moreover, the potential consequences which have been suggested by Petitioner Bank are not in any way warranted under the decision herein.

The decision of the Fifth Circuit does not grant the power for states "to determine that virtually any national bank activity performed off-premises was unlawful" as asserted by Petitioner Bank (Pet. at 10). Since the activity must be a branch as defined under section 36(f) before state branching law ever comes into play, any facility which did not have the characteristics of a branch under federal law would not be controlled by state law.[15] Accordingly, a

15. It is significant that the only instances cited by Petitioner Bank where off-premises banking operations of a national bank

state could never prohibit an activity of a national bank by defining a branch in "different and conflicting terms" from section 36(f). For instance, separate data processing facilities could not be prohibited under state law as branching, as Petitioner Bank portends, because that is not a functional characteristic of branch banking under section 36(f). Similarly, solicitation of new business, correspondent services, and credit card operations do not involve the establishment of an additional place of business, and, hence, could not be prohibited to national banks under state branching law.

Nor does the decision below give *state banking commissioners* the prerogative to arbitrarily originate a definition of branching activities of national banks. In the instant case, there is a *state statute* which the Court expressly found was violated by Petitioner Bank's off-premises banking operations. There is obviously an interest on the part of the state and its banking officials in enforcing its branching laws both as to state and national banks. This was early recognized in *First National Bank* v. *Missouri*, 263 U.S. 640, 659-660 (1924), where the Supreme Court held that, since the sanction behind branching law as applied to national banks is that of the state, the power of enforcement must similarly rest with the state. The decision of the Fifth Circuit herein simply recognizes the right of such state officials to assert state law as to branching operations of national banks as well as state banks.

(C) The off-premises banking operations of Petitioner Bank violate Floride Statute Section 659.06.

Under Florida Statute Section 659.06, all the business of a bank is required to be performed at its banking house

---

have been ruled to violate state branching law have involved off-premises deposit machines (similar to the shopping center depository used herein). Such facilities meet the test of a branch under 12 U.S.C. §36(f) since deposits are received there.

and authorized drive-in or walk-up facilities. (App. 35a-36a).

A bank drive-in or walk-up facility is authorized under Florida law only *if it is located on the same property as the main banking house or on property contiguous thereto.* FLA. STAT. §659.06(2). Yet Petitioner Bank's walk-up depository facility is located in a shopping center about *a mile away* from the Petitioner Bank's building in Plant City, and the armored car operates many miles away.

Petitioner Bank and the National Comptroller acknowledge that the pick-up of deposits from and delivery of currency to customers off-premises by employees of Petitioner Bank operating its armored car constitutes the performance of banking business. (R. 22-23, 569-70). The Fifth Circuit expressly found that such off-premises activities constituted the business of banking in violation of Florida Statute §659.06(1).

Petitioner Bank argues that the Fifth Circuit's application of Florida Statute Section 659.06(1) is in conflict with decisions of other courts holding that "regulations or interpretations of State Banking Commissioners are not to be considered in determining what the statute law of the state permits or prohibits with respect to national bank branches."[16] (Pet. at 17). No such conflict exists.

In the instant case, the Fifth Circuit Court itself construed the Florida statute. Noting that Florida Statute §659.06(1)(a) is "uncomplicated, unhedged and unmodi-

16. The cases cited by Petitioner Bank do not so hold. In *Union Savings Bank* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964) and *Leuthold* v. *Camp*, 273 F. Supp. 695 (D. Montana 1967), the federal court simply disagreed with rulings by state officials that the activities complained of violated state statutory law and therefore refused to be bound by such rulings. In *South Dakota* v. *National Bank*, 219 F. Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), there was no state statute embodying the branching restriction sought to be enforced by the state banking officer.

fied," the Fifth Circuit Court specifically found that, "unless we were to cast away all concepts of the functional 'business' of a bank, *we would have to conclude* that First National was 'doing business' with its extra services." (App. 19a) (Emphasis supplied). Thus, the Court did not simply rely on the statutory interpretation of the State Comptroller, although its interpretation of Florida Statute §659.06 is consistent with the State Comptroller's. (App. 18a).[17]

Petitioner Bank also argues that the Fifth Circuit erroneously abdicated its duty to construe state branching law by conditioning its decision on the outcome of pending state court litigation. As was previously pointed out, however, the Court of Appeals itself specifically considered and determined the question of whether the banking operations violated state law. Unlike the case of *Howell* v. *Citizens First National Bank*, 385 F.2d 528 (3rd Cir. 1967), there was no "abstention" by the Fifth Circuit Court. The Court merely retained jurisdiction in an effort to protect Petitioner Bank from a defense of "res judicata" in the event state courts subsequently permitted state banks to perform such off-premises operations.

II.

THE DECISION OF THE COURT OF APPEALS IS CORRECT ON ANOTHER GROUND.

The decision sought to be reviewed herein is correct for other reasons as well. The Court of Appeals properly refused to permit Petitioner Bank to use the subterfuge of "agency" and "deposit" agreements as a means of avoiding the provisions and policy of the federal branching statute. Respondents submit that the Fifth Circuit instead correctly found that Petitioner Bank is receiving deposits and cashing

17. See also, the opinion of the Florida Attorney General to the same effect on an analogous point. 58 *Op. Fla. Att'y Gen.* 110 at 616 (1958).

checks at its off-premises facilities and thereby branch banking in direct contravention of the terms of section 36(c) and (f).

(A) Petitioner Bank is cashing checks and receiving deposits at its off-premises facilities.

A major service of Petitioner Bank's off-premises armored car operations is the delivery of currency to the customer's premises. The District Court expressly found that "insofar as such change is delivered in exchange for checks, this practice may amount to cashing checks off the bank's premises . . . ." (R. 2058-59; App. 30a). Performance of this function alone necessarily rendered the operation of the armored car an illegal branch facility under the terms of 12 U.S.C. §36(c) and (f).

Furthermore, the *physical* and *functional* act of receiving deposits is completed by Petitioner Bank at facilities away from its banking house. Possession of and responsibility for the deposits is transferred by the depositor to and is accepted by Petitioner Bank at its off-premises facilities. Nothing remains for the depositor to do to complete the making of the deposit, and the only thing which remains for Petitioner Bank to do is to "accept" the deposit. Petitioner Bank has, of course, never refused to "accept" a deposit received off-premises by its messenger. (R. 938).

Respondents submit that Petitioner Bank is thereby receiving deposits off-premises. The federal branching statute prohibiting this operation cannot be evaded by means of a contract asserting that the bank is receiving the deposits as agent for the customer and that the deposits are not accepted until they reach the banking house.

In the first place, section 36(f) makes *receipt* and not acceptance of deposits the indicia of a branch. That Petitioner Bank is *receiving* deposits off-premises is established

by *State Chartered Banks* v. *Peoples National Bank*, 291 F. Supp. 180 (D.C. Wash. 1966). There the national bank argued that it was not cashing checks within the meaning of 36(f) because entry of the check on its books and transmittal of the check to the drawee bank was done at the main banking house. Holding that branch banking is a matter of function and not bookkeeping, the District Court found that the bank was branch banking as defined in §36 (f). The Fifth Circuit Court herein subscribed to that decision completely, holding that one important reason that it did so was that:

> *"we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language."* (App. 16a) (Emphasis supplied).[18]

In the second place, regardless of the self-serving statements in the so-called "agency" agreements, the evidence established without question that Petitioner Bank is *not* in fact acting as agent for its customers when it receives monies off-premises. The agent's power to bring about business relations between the principal and third persons, control of the principal over his agent's actions, and a primary obligation of the agent to act for the benefit of his principal are elementary factors in the principal-agent relationship. In the instant case, *none* of the requisite characteristics of an agency relationship exist between Petitioner Bank and

---

18. Petitioner Bank has stated that the Court of Appeals "apparently" agreed with the District Court below that it was not receiving deposits off-premises in view of the contractual documents providing to the contrary (Pet. at 9). Respondents submit that, on the contrary, the Court of Appeals clearly rejected that holding. App. 10a, 16a. The Court of Appeals noted that Respondents contested the extent of Petitioner Bank's compliance with its purported procedures relating to contract and agency, but found such disputes irrelevant "in light of our decision." App. 6a. This could only be so if the Court of Appeals concluded that the agency and deposit agreements did *not* whitewash the off-premises operations.

its customers. Clearly an agency relation does not exist merely because the parties designate their relationship as such. Restatement (Second) of Agency §1 at 8 (1957); 1 Fla. Jur. *Agency* §5 (1955); see also, *Bartels* v. *Birmingham*, 332 U.S. 126 (1947).

(B) The off-premises banking operations of Petitioner Bank have traditionally been considered branch banking.

Prior to passage of the McFadden Act in 1927, national banks had no legal power to branch bank. *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). Nevertheless, it was apparent to Congress that national banks were being authorized by the Comptroller of the Currency to branch bank through various subterfuges, *including off-premises agencies*. 66 Cong. Rec. 1627, 1777, 4410 (1925); 67 Cong. Rec. 3232, 3241 (1926). Branch agencies were consequently expressly included in section 36(f).

Accordingly, for many years the office of the Comptroller of the Currency ruled[19] that off-premises agency operations of the exact nature involved herein constituted branch banking. (R. 1436-519). However, in late 1963, Comptroller Saxon ruled there was no branching under such circumstances so long as the bank utilized a contract stating that it was acting as agent for its customer, regardless of whether or not an agency relationship actually existed.[20]

As a result of this ruling, Petitioner Bank is receiving deposits and cashing checks off-premises, but attempting to

19. Prior to Saxon's ruling, the Comptroller of the Currency required an *actual* agency relationship to exist between the customer and an armored car service which delivered monies to and from a national bank. (R. 1466-67, 1477; A. 6-7).

20. The requirement of the so-called "agency" and "deposit" agreements is admittedly imposed by the office of the Comptroller of the Currency in order to avoid the prohibitions of 12 U.S.C. §36. (R. 1493).

evade the express prohibition of such activities under 12 U.S.C. §36 by the device of "deposit" and "agency" agreements between the bank and its customers. Respondents submit that the Fifth Circuit properly held that such devices were mere subterfuges and that the congressional intent to insure competitive equality between national and state banks in the matter of branching should not be permitted to be destroyed by such devices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

V. CARROLL WEBB
General Counsel to Comptroller of the State of Florida
The Capitol
Tallahassee, Florida

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER
P. O. Box 3239
Tampa, Florida 33601

By .....
WM. REECE SMITH, JR.

APPENDIX

A. STATUTES

FLORIDA STATUTE § 659.06

659.06 Place of transacting business; school savings; drive-in facilities

(1) (a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

(b) A bank may contract with proper authorities of any elementary or secondary school or institution caring for minors for the participation by the bank in any school or institutional thrift or savings plan, and it may accept deposits at such school or institution, either by its own collector or by any representative of the school or institution who becomes the agent of the bank for such purposes. Withdrawal from any account carried with the bank by any such school or institution shall be made only at the banking house of said bank.

(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main

banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965.

TITLE 12, UNITED STATES CODE § 24 (SEVENTH)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . . .

B. DOCUMENTS USED BY PETITIONER THE FIRST NATIONAL BANK IN PLANT CITY IN ITS OFF-PREMISES OPERATIONS.

THE *First* NATIONAL BANK
IN PLANT CITY
PLANT CITY, FLORIDA 33566

MESSENGER TRANSMITTAL

_____
(Principal)

_____
(Address of Principal)

_____
(Date)

NATIONAL BANK, Plant City, Fla. as messenger and for Principal named above will transmit to the bank-ner the following, in accordance with the contract on erse side hereof:

PLEASE LIST CHECKS BELOW

	DOLLARS	CENTS

ACCOUNT NUMBER

TOTAL DEPOSIT	COIN	CURRENCY	TOTAL CHECKS	

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED

RECEIPT OF MESSENGER

Received locked bag stated to contain the sum shown above ☐ INITIAL

The above total received and verified ☐ INITIAL

CONTRACT

First National Bank, Plant City, Fla., as messenger and agent for Principal named on front side hereof, agrees to transmit the currency, coin and checks detailed on the front side hereof to the bank's offices at 302 West Haines Street, Plant City, Fla. for deposit to Principal's account. It is agreed and understood by Principal and the bank that in transmitting said currency, coin and checks, the bank is acting solely as agent for said Principal and that the transmittal of said currency, coin and checks, shall not be deemed to be a deposit until delivered into the hands of the bank's tellers at the said banking house.

The bank maintains hazard insurance covering holdup, employee fidelity, etc. for the protection of the Principal for all amounts and items delivered to the bank's messenger by said Principal.

Messenger Transmittal Slip

(R. 2095)

Comprehensive Dual Control Contract [R. 2094]

THE FIRST NATIONAL BANK IN PLANT CITY,

Plant City, Florida

Messenger Service

Comprehensive Dual Control Contract

As agent for the undersigned depository, The First National Bank Messenger will transport monies of the depositor to and from the banking house.

Under the COMPREHENSIVE DUAL CONTROL CONTRACT, all monies, transported solely in padlocked money bags furnished by bank, shall be opened only under the dual control of two bank's tellers. For this purpose, bank will retain a pass key for depositor's bag(s); a key for each bag will be furnished depository. The depositor expressly authorizes the service described and agrees to accept the bank's count of monies as final.

The First National Bank in Plant City maintains hazard insurance covering holdup, employee fidelity, etc., for the benefit of the depositor for all amounts delivered to bank's messenger for delivery to bank and for all amounts requisitioned by depositor for delivery from bank to depositor. Unless otherwise authorized in writing, only the undersigned shall be permitted to receipt the bank's messenger for monies delivered to depositor.

The bank acknowledges the receipt of $..... representing a service charge for ..... bags, $..... of which shall be refunded upon the termination of service and return of said bags.

This contract shall remain in full force until terminated by either party.

.....

Depositor

The First National Bank in Plant City

By .....

Date .....

September 11, 1963 [sic—1953].

Dear Mr. Morris:

Reference is made to your letter of August 18, 1953, addressed to Chief National Bank Examiner R. S. Beatty, which Mr. Beatty has referred to this office for reply. The question raised there is the permissibility of one of the directors of your bank operating an armored car service in Cheyenne.

It would appear that any objectionable features of the plan would not directly arise from the fact that a bank director is operating an armored car service, but rather, difficulty may occur from the nature of the services a director-owned corporation might render your bank. The term "branch" is defined in Section 5155 of the Revised Statutes (12 U.S.C. 36) to include

> "* * * any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

In interpreting this section this office regards the crucial point to be whether those persons receiving deposits outside the banking quarters are acting as agents of the bank. In determining such a relationship we consider, among other things, whether the service purports to act as representative of the bank, whether the service is compensated by the bank rather than by the customer, whether responsibility for loss would be borne by the bank or by the armored car service, etc. Should any one of these factors be found to exist then the entire activity would be an illegal branch banking activity.

We have no objection if a plan is arranged under which an armored car service acts as the agent of depositors, and the bank has no responsibility, apparent or otherwise, for the deposits until they reach the banking quarters. We could not say, as a matter of law, that a director of your bank could not engage in such an activity. However, this

office will examine with great care any arrangement arrived at between your bank and an armored car service operated by a bank director.

Yours very truly,

/s/
Deputy Comptroller of the Currency

* * *

May 31, 1962

Dear Mr. Crockett:

This is in reply to your letter of March 22, 1962, in which you have inquired as to the existence of regulations governing the activity of bank couriers or messengers who deliver cash to customers and pick up deposits from them. You state that your principal interest is in possible distance limitations on such operations.

The furnishing of this type of service by a bank often comes into conflict with the provisions of 12 U.S.C., Section 36, as constituting an illegal branch banking activity. This section defines a branch as any place "at which deposits are received, or checks paid, or money lent." We have maintained that the practice of furnishing mobile pick-up service of the deposits of customers is a type of branch banking which the statutes do not permit. As to the delivery of cash to customers, we have not objected when the customer's check for the full amount is presented to the bank for payment prior to the departure of the messenger, so that it cannot be said that the checks are being cashed away from the banking premises.

On the other hand, we would not object if a group of your customers hired a messenger to perform a deposit pick-up service at their expense. In such an arrangement, the messenger would be the agent of the customer and not of the bank, and no deposit is effected until the funds reach the bank.

There are no distance regulations as to those operations which comply with the foregoing.

Very truly yours,

(Signed) G. W. Garwood
Deputy Comptroller of the Currency

DEM:mz—5/29/62

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief and Appendix was furnished, on behalf of Respondents, Fred O. Dickinson, Jr., Comptroller of the State of Florida, The Hillsboro Bank, First Ruskin Bank and Peoples Bank of Lakeland, by airmail, postage prepaid, this ..... day of ....., 1969, to Robert S. Edwards, Esquire, Post Office Box 1119, Plant City, Florida 33566, Attorney for Petitioner, The First National Bank in Plant City, and to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530.

.....

WM. REECE SMITH, JR.
Attorney for Respondents:
Fred O. Dickinson, Jr.,
Comptroller of the State of Florida,
The Hillsboro Bank,
First Ruskin Bank,
Peoples Bank of Lakeland